United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1054

In The

United States Court of Appeals

For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Appellee,

v.

LEON GREENBERG,

Appellant.

Appeal from the United States District Court for the Southern District of New York.

APPELLANT'S BRIEF

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Introduction

This is an unusual case. It involves the former President of the Monticello Raceway, Leon Greenberg, who was convicted in the Southern District of New York of conspiracy and mail fraud. The five-count indictment charged that the appellant misapplied $4,856 of the Raceway's funds for his son's Bar Mitzvah.

In 1970 Paul Grossinger, a close friend of Leon Greenberg, offered him a deal if he would have his son's Bar Mitzvah at his well-known resort hotel. Appellant understood that he would pay for everything but the food. That is the way the Bar Mitzvah was charged on Grossinger's books.

During that same year the Raceway used Grossinger's to entertain their "horsemen." * On Wednesday afternoons 35 to 40 horsemen went to Grossinger's for cocktails, lunch, golf and dinner. Grossinger's billed the Raceway $4,856 for five such outings held in July and August of 1970.

The Government claimed that these bills were fictitious and that their payment actually covered the Bar Mitzvah. However, a number of horsemen, the golf pro, the maitre d' from Grossinger's, the Raceway's comptroller, and other track employees all testified that these outings actually occurred. Even Paul Grossinger admitted to at least one such party in 1970, but he did not know how many others were held. Thus, the appellant proved that this corporate expenditure was authorized and appropriate.

The Bar Mitzvah was not held until November, 1970. When Leon Greenberg received an unitemized bill for $6,000 in March of 1971, having paid for everything but the liquor, he understandably asked that the statement be verified. Paul Grossinger, without ever speaking to Leon Greenberg, reduced

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* "Horsemen" is a term used to describe trainers, drivers, grooms and other racetrack personnel.

the bill in the amount of $4,856 (the amount charged for the horsemen's outings). Leon Greenberg paid the balance in the amount of about $1,000 with his personal check. Both Grossinger and his comptroller, named in the indictment as co-conspirators, denied conspiring with Leon Greenberg to defraud the Raceway. In essence, that is what this case is all about.

Appellant's trial commenced before the Honorable Milton Pollack on November 5, 1975 and concluded when the jury, after deliberating for two days, found the defendant guilty on all charges.* On January 21, 1976, Leon Greenberg was fined $9,000 and placed on probation for two years.

This appeal is expedited under the Court's scheduling order which provided that appellant's brief and appendix be filed on February 27, 1976 and the Government's brief on March 29, 1976. Argument is set for the week of April 5, 1976.

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*At one point during the second day of deliberation, the jury reported that it was deadlocked.

TABLE OF CASES

Questions Presented

1. Whether the evidence offered against appellant was insufficient as a matter of law to establish guilt beyond a reasonable doubt that he defrauded the Monticello Raceway by using the mails or conspired to do so.

2. Whether the appellant's conviction must be reversed because the court misinstructed the jury on the following matters:

   (a) on the appellant's theory of defense;

   (b) that Grossinger and Roth were accomplices as a matter of law and erroneously designated them as "co-conspirators";

   (c) on the rule of reasonable doubt by stating a reasonable doubt is a "substantial doubt";

   d) on the issue of Grossinger's and Roth's immunity.

3. Whether it was reversible error not to hold a hearing on appellant's complaint that illegally seized evidence was used in the federal prosecution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Statement of Facts

It took a strange combination of events to give rise to this case—a case filled with a large quotient of misunderstanding. Although the facts relevant to the issues here are for the most part neutral, there is a danger in framing them too narrowly. This appeal is best understood by arranging the events in proper sequence under appropriate subheadings. We begin with an outline of the indictment.

Count 1—Conspiracy—Leon Greenberg is alleged to have conspired with Paul Grossinger (President of Grossinger's Hotel) and Bernard Roth (Grossinger's comptroller) to defraud the Sullivan County Harness Racing Association (Monticello Raceway) by having it pay $4,856 for a portion of Leon Greenberg's son's Bar Mitzvah.

Count 2—On September 30, 1970 Bernard Roth mailed allegedly false bills in the amount of $4,856 covering horsemen's outings from Grossinger's to Monticello Raceway.

Count 3—On October 20, 1970 a check of Monticello Raceway in the amount of $4,856, signed by Leon Greenberg, was sent to Grossinger's in payment of the horsemen's bills.

Count 4—On April 6, 1971, Leon Greenberg sent a letter to Paul Grossinger inquiring about the amount of the bill for his son's Bar Mitzvah.

Count 5—On July 12, 1971 Leon Greenberg sent his personal check in the amount of $987 in payment of a portion of the Bar Mitzvah cost.

So much for the grand design of the prosecution's charges. Since this Court is called upon to review the sufficiency of the evidence against Leon Greenberg, some discussion of his background is appropriate.

Leon Greenberg's Background

This case reveals a study of a man's unselfish dedication to community service and unsparing devotion to a business enterprise rarely seen by this Court. Leon Greenberg, who is 49 years old, was born and raised in Mountaindale, located in Sullivan County, New York (SM 2).* He attended Mountaindale High School, Syracuse University, Brooklyn Law School, and was admitted to the Bar of New York in 1949 (SM 2).

In 1954 he became the Assistant District Attorney of Sullivan County and during a three-year tenure established himself as an outstanding public prosecutor (197, SM 2).** In 1957 he became attorney for the Monticello Raceway, which commenced operations in the summer of 1958 (198, SM 2). In 1963 he became Administrative Vice President and on May 1, 1968 he was elected President because of his outstanding efforts and devotion to the racetrack (198). As the Raceway's chief executive, he worked seven days a week, fourteen hours a day (197). When he took over the presidency of the Monticello Raceway in 1968, its gross earnings were $651,331. By 1973, under his leadership, the Raceway's earnings soared to $2,310,608 (SM 3). Leon Greenberg is married and the father of two fine children (SM 11).

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* Refers to pages of the appellant's sentencing memorandum filed with this Court.

** Numbers in parentheses refer to the pages of the appendix.

Appellant's Good Character

There is no way that Leon Greenberg's forty-nine years of achievement can be squeezed into a four-day trial or the space limitations of an appellate brief. However, the high esteem held for Leon Greenberg in his community was harvested through a number of distinguished character witnesses and letters from prominent citizens and organizations. Listed below are the eminent people who vouched for Leon Greenberg's good character and excellent reputation for truth and honesty.

Hon. Henry F. Werker--United States District Court Judge of the Southern District of New York; retired Lieutenant Commander in the United States Navy (337-341)

Howard Samuels—Former Undersecretary of Commerce; Democratic candidate for Governor of the State of New York; Lt. Col. on Gen. George Patton's staff in World War II; New York's Director of Off-Track Betting (390-395)

Joseph Wasser—Sheriff of Sullivan County and former Town Justice (406-407)

John Duncan—Vice President of the Monticello Youth Group and County Coordinator of the NAACP (420-422)

Rabbi Julius Kreitman—Rabbi in South Fallsburg, New York (424-428)

Father Alfred Isaacson—Principal of St. Albert's Junior Seminary, Middletown, New York (471-473)

Ann Kaplan—Mayor of Monticello (428-430)

In addition to these renowned character witnesses who attested to Leon Greenberg's good character, 222 persons wrote

letters on his behalf at the time of sentencing (SM 10, 742, 743). Among the groups filing letters with Judge Pollack certifying to Leon Greenberg's good character and community service were:

Board of Directors of Monticello Raceway*

Monticello Chamber of Commerce

Monticello Jaycees

Sullivan County Daycare Center

Hudson Delaware Council of the Boy Scouts of America

St. Peter's Senior Citizens

Sullivan County Branch of the NAACP

South Fallsburg Hebrew Association

Hebrew Congregation of Mountaindale

These letters and witnesses provide but a snapshot of Leon Greenberg's remarkable contribution of time and money to worthwhile community projects. For instance, he was President of the Hebrew Day School in his community and worked energetically with the Monticello Youth Group and the Sullivan County NAACP (422, 427). The evidence overwhelmingly showed that he was a self-made man, who believed in putting back into the community more than he took from it. Now let us discuss the sad train of events that led to his indictment.

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* A letter reaffirming their confidence in Leon Greenberg and detailing his contribution to the Raceway's success and his devotion and loyalty to the Raceway.

The Bar Mitzvah

The origin of this controversy dates all the way back to the summer of 1970 when Leon Greenberg and his wife began planning for the Bar Mitzvah of their first son, Andrew (183). They had intended to hold the celebration at the Concord but Paul Grossinger, a long-time friend and a Vice President of the Raceway, prevailed upon them to have it at his hotel (183). Grossinger claimed that he offered to hold the affair at his place at cost (186). Leon Greenberg contended that Grossinger promised to donate the food, and he agreed to pay all other expenses (668). The Bar Mitzvah was held on the morning of November 7, 1970. A luncheon and cocktail party followed (68). Appellant paid for the flowers, orchestra, magician, photographer, gratuities and all other incidental expenses (127, 404, 405).*

Appellant's understanding of the financial arrangements for the Bar Mitzvah is confirmed by Grossinger's posting on its ledger card entitled "Greenberg Bar Mitzvah—Master Account" (GX-8) on November 7, 1970 all costs of the Bar Mitzvah except the food. Because of the importance of this exhibit, we have reproduced it on the next page.

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* Appellant proved payment of a number of these bills during the trial. As to the other items, there was never any dispute that these expenses were not borne by Grossinger's. The Bar Mitzvah cost Leon Greenberg close to $5,000.

CITY LEDGER

			CHARGES	CREDITS	BALANCE	PICK-UP	TOTAL
1	[illegible]	[illegible]	[illegible]				
2	[illegible]	[illegible]	[illegible]				
3	NOV-7-70	BAR	1083.20		$1,083.25		
4	NOV-8-70	— PLUIO	1200.00		$3,083.25		
5	NOV-8-70	FLOWERS —	$ 1[illegible]		$3,171.25		
6	[illegible]	— PLUIO	$ 75.00		[illegible]		
7	[illegible]	— ADJUST		2259.16	[illegible]		
8	[illegible]	— TAXES		$987.09	[illegible]		
9	JUL-6-71	CHECK —	$987.09		$987.09		
10						$987.09	
11	JUL 13-71	— C/CO —		$987.09	$ 0.00		
12							

EXTRA MEAL CHARGE

WM. ALLEN & CO., N. Y. 5 DOCKFORM 7085

No 4356 19

M. ROOM

EXTRAS MEAL $ AMOUNT

PAID CHARGED

$ CASHIER $ CLERK

REMARKS

TO PAY FOR ALL

GROSSINGER'S

GROSSINGER'S - GROSSINGER, N. Y. 12734

HIS ACCOUNT BE REFERRED TO AN ATTORNEY FOR COLLECTIO
THE UNDERSIGNED AGREES TO PAY AN ATTORNEY'S FEE OF 20
ABOVE BILL PLUS ALL COURT COSTS AND EXPENSES.

GUEST'S SIGNATURE

CHARGE TO

ADDRESS

CITY & STATE ZIP

Significantly, these expense items were registered on the ledger at retail prices and not at cost as suggested by Paul Grossinger. Thus, as of November 8, 1970, the day after the Bar Mitzvah, Grossinger's records showed the outstanding retail price of the Bar Mitzvah as $3,171.*

Leon Greenberg never saw these charges nor was he told of the amount. That is how matters stood until the spring of 1971 when Leon Greenberg received his first Bar Mitzvah bill from Grossinger's in the amount of $5,843 (13, 179). This statement was not itemized and of course did not correspond with the ledger card containing charges of $3,171.

The Greenberg Letter

Since the Bar Mitzvah bill did not correspond with his understanding of the financial arrangements for the Bar Mitzvah, Leon Greenberg understandably, on April 6, 1971, wrote a letter to Grossinger's which simply stated:

> "Would you please verify the correctness of this bill?" (GX-15A, 83)

Paul Grossinger, without ever talking to Leon Greenberg, instructed Bernard Roth, his comptroller, to reduce the Bar

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* The retail charges of $3,171 included a gratuity charge of $1,200 which Leon Greenberg proved he paid on the day of the Bar Mitzvah (462). That would reduce the bill to $1,971. All the figures are rounded off to the nearest dollar.

Mitzvah bill by $4,856 leaving a balance of $987 (85). Certainly this appeared, at first blush, to be a low point in the defendant's case. However, Grossinger freely admitted that his action was based upon "a conclusion" he reached himself (189).* The balance of the Bar Mitzvah bill was paid by Leon Greenberg's personal check (GX-20). Since Leon Greenberg had paid all the expenses connected with the Bar Mitzvah, he properly assumed that the $987 was for the liquor. It should be remembered that the Bar Mitzvah was held in the morning and the celebration involved only a luncheon with cocktails.

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* "The Court: Is this an understanding that you had from Mr. Greenberg?

The Witness: No, it was a conclusion I drew myself, sir" (189).

* * *

The Court: Was there anything else said to give you any indication as to what you and he were talking about?

The Witness: No, sir" (190).

Grossinger did say that the conclusion was drawn from his initial conversation during the summer when the appellant said that he had approval for this billing (189). It is obvious from the record that Paul Grossinger misunderstood Leon Greenberg's remark. The appellant had indicated that he had Executive Committee approval for the billing of the horsemen's outings! (189) This most unfortunate misunderstanding, and perhaps some bad luck, conspired against Leon Greenberg at his trial.

At the trial the prosecution made much of a gratuity voucher in the amount of $1,200 signed by Leon Greenberg but dated November 8, 1970, the day after the Bar Mitzvah (GX-9).* Hyman Hoffer, the assistant maitre d' at Grossinger's testified that Leon Greenberg asked him during the Bar Mitzvah how the matter of the gratuities should be attended to (462). Hoffer advised him to speak to Dave Giver, who was in charge of the Bar Mitzvah (462). Hoffer saw Leon Greenberg speak to Giver and then witnessed appellant pay him an unknown amount of cash (462). This proof was uncontroverted. Although Dave Giver was available to the government, neither he nor anyone else was ever called to prove that $1,200 was ever disbursed to Leon Greenberg.

The Horsemen's Outings

Over the years, the Raceway encouraged drivers to race at its track by entertaining them rather lavishly (234-441). For instance, in 1975 the Raceway spent approximately $40,000 entertaining horsemen (241). Every Wednesday during the summer,

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* Accordingly, the defense argued, as the only inference to be drawn from this evidence, that the gratuity slip had to have been signed in blank and the cash drawn on November 8 (the date of the posting of the charges of $1,200 to Leon Greenberg) and the cash distributed to the employees on the day after the Bar Mitzvah. Thus, Leon Greenberg would not have known how much money was paid for gratuities.

the horsemen were invited to one of the resort hotels for cocktails, lunch, golf and dinner (365).* Since Grossinger's was the closest to the Raceway, had the finest facilities and the best golf course, the horsmen preferred that hotel over all others (376).

Peter Donnelly, a member of the P.G.A. and the resident pro at the Costa Del Sol Golf and Racquet Club in Florida, was the golf pro at Grossinger's in 1970 (342-343). That was the year that Grossinger's opened its 27-hole golf course (111). Since 1970 was his first year at Grossinger's, Donnelly remembered that there were about six horsemen's outings held at the hotel (344). He recalled that 20 to 40 horsemen from the Raceway attended these outings (344).**

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* Every Wednesday morning, an attendance sheet was posted in the Racing Secretary's office at the Raceway (312, 316). Horsemen interested in attending the outing would sign up. The attendance sheets were retained in the Publicity Office until a bill was received from the hotel and then they were discarded (316, 319, 320). A sample of one of these sheets used for another outing was received in evidence as DX-T (317).

** Since the Raceway bought three golf balls for each player, these outings were most beneficial to the golf pro and undoubtedly helped him to remember the affairs (365). Of course, Donnelly was unable to say on what date the excursions occurred, but he did swear that there were six or seven and that they were held on Wednesdays (344, 359).

When Peter Donnelly was contacted by defense counsel's investigator in Florida, he immediately called Paul Grossinger and explained that he was about to be interviewed (356). He told Grossinger that the investigator had asked him about the 1970 golf outings and Donnelly testified that Grossinger agreed that the outings had taken place and that he should just tell the truth (358).

The following horsemen, who attended the 1970 outings, testified to this parties at Grossinger's:

> James Curran—Driver—At the time he testified he was racing at Liberty Bell Racetrack in Philadelphia. He stated he attended five or six outings held at Grossinger's in the summer of 1970. Horsemen were given lunch; cocktails; a golfcart; golf green fees were paid; drinks after the golf; and if they wanted to stay, dinner (363-365).
>
> Richard Manzi—Driver-Trainer—He attended three outings at Grossinger's in 1970 and on one occasion won a trophy which was marked for identification and displayed to the jury (384, Def. Ex. for Id FF). He took his wife to those outings (386).
>
> Herman Carbone—Driver-Trainer for 23 years—he went to Grossinger's in 1970 to the horsemen's outings and played softball (401).
>
> Robert DelCampo—Driver-Trainer—Attended four or five outings in July and August of 1970 at Grossinger's (414-415). He remembers it well because that was the first year he played golf, and he recalls there were 35 to 50 horsemen at the outings he attended (416).
>
> George Berkner—At the time he testified he was racing at Liberty Bell Racetrack in Philadelphia and he recalled attending one golf outing in 1970 at Grossinger's and he stayed for dinner (396-399).

Robert Schoonmaker, the Raceway's comptroller and a government witness, testified that in 1970 he attended three or four golf outings at Grossinger's (239). He recalls that there were anywhere from 20 to 40 horsemen at each of the affairs (239). He also stated that during those years the Raceway spent about $20,000 per year on these outings (240).*

Hyman Hoffer, who is 71 years of age and the assistant maitre d' at Grossinger's, recalled the horsemen's outings being held there in 1970 (456, 457). He testified the arrangements for the parties were made through him (457). He remembers that a number of the horsemen ate dinner in the dining room and that no bills were prepared for them (458). Hyman Hoffer has been at Grossinger's for over 30 years as assistant maitre d' and is Paul Grossinger's uncle (456, 457).

The only witness who testified that the outings could not have occurred was Paula Bergman, a former employee of Grossinger's, who admitted on cross examination that her testimony was based on the absence of records and not on her personal knowledge (278). She worked in the golf clubhouse during 1970 and contended that a separate slip would be made up for each golfer whether he was

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* Since there were only about five hotels that the horsemen regularly attended and since Grossinger's was the most popular, it follows that the Raceway would have spent at least $5,000 for the Grossinger outings (376).

a horseman or a guest. However, the defense proved that since the hotel is on the American Plan, it would not ordinarily charge separately for golf (99, 103). Consequently, special events like the horsemen's outings were unique, and the hotel's normal accounting procedures did not accommodate them (103, 105).*

Paul Grossinger instructed Bernard Roth to make up statements "for the horsemen's outings which took place during the summer of 1970 at Grossinger's" (52). Grossinger conceded that there was at least one horsemen's outing in 1970, but could not recall the others (185, 195). He testified that in having these

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* Peter Donnelly, the golf pro, indicated that separate procedures were used for the Monticello horsemen (355). He thought their slips, which were blanket slips, were filed differently in the hotel, which might account for their not being among the guests' golf slips. The defense was able to produce a golf slip covering 26 golfers (13 carts) which was made out by Paula Bergman (346, DX-V). These were called blanket slips and were used for the horsemen's outings (347, 353).

Although Paula Bergman testified that she could find no slips for horsmen on July 8 and 22 and August 5, 12 and 26 of 1970, she admitted that July and August were the busiest months for the golf course and the attendance on any given day could range from 200 to 250 golfers (278, 279). It is more than a curious fact that on the date when the horsemen's outings took place, there were only about 50 golf slips:

July 8, 1970	42 slips (279)
July 22, 1970	59 slips (284, 285)
August 5, 1970	56 slips (284)
August 12, 1970	39 slips (282)
August 26, 1970	63 slips (283)

horsemen's bills sent to the Raceway he believed that he had done nothing wrong (206).

Bernard Roth could not say that the outings did not take place and admitted that he did not spend any time at the golf course (97, 98).* He acknowledged that the hotel regularly entertained horsemen fromthe Raceway (96). Bernard Roth swore that he never agreed with anyone to defraud the Monticelly Raceway (152). He stated that he had no reason to believe that the horsemen's account related in any way to the Bar Mitzvah account (138). No other bills were sent to the Raceway for these horsemen's outings other than GX-1A-G.

The Horsemen's Bills

As indicated earlier, the defense contended that when Paul Grossinger agreed to hold the Bar Mitzvah on a reduced fee basis, Leon Greenberg suggested that he send bills for the horsemen's outings held during July and August to the Raceway (200).** Consequently, Grossinger told his comptroller, Bernard Roth, to call Leon Greenberg for the details of the outings for billing purposes (52).

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* Previously, when Bernard Roth was asked by the prosecutor whether to his knowledge these outings ever took place, he testified on direct examination, "Not now, no." However, this testimony is in direct conflict with what he said on cross examination.

** Grossinger did not deny that Leon Greenberg said this, but merely suggested he did not recall it being said (200).

Perhaps the most prominent event in this litigation occurred when Roth spoke to Leon Greenberg and asked about the outings. It was necessary for Leon Greenberg to get the golf attendance sheets retained by the Raceway so he could fix the dates of the outings and the number of persons who attended them (323). He asked his secretary, Eileen McCullough, for the sheets, but she said she did not have them (323). He then went down to the Publicity Department and brought the sheets back to his office (323, 324).* Using the attendance sheets, he was able to furnish the dates and the number of men who attended the outings (53). Appellant told Roth that he understood that the men had lunch and played golf (109). When Roth asked the appellant whether the outings took place, he stated, "They definitely took place" (54).

After Roth had computed the five bills, he called Leon Greenberg back and told him they came to about $3,000 (55). Leon Greenberg estimated that more money was "due Grossinger's"

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* Loretta Kratz testified that the attendance sheets were kept in the Publicity Department's office under the supervision of Jake Iberger, who left the Racewa in 1974 (435)..

Significantly, Roth conceded that "after a bit of time" Greenberg identified the dates of the outings, which confirms that Leon Greenberg obtained the attendance sheets from the Publicity Department so that he could identify the dates of the outings and the number of men who attended.

because he understood the affairs consisted of lunch, cocktails, golf and dinner (55, 109). Finally, Leon Greenberg indicated to Roth that he believed the Raceway owed Grossinger's approximately $5,000 (56).* The final bills were prepared and then the usual 25% discount given to the Raceway was deducted (58). The bills were then sent to the Raceway (58).

Payment of the Horsemen's Bills

Edna Coyle, the Raceway's bookkeeper, explained the procedure for paying bills (438-439) and stated that the Raceway's check in payment of the horsemen's bills was drawn on October 29, 1970 (438, 439). But it was held for the Executive Committee's approval at a meeting held on November 2, 1970 (446). The check was signed at the Executive Committee meeting by Sidney Sussman, the Chairman of the Board of Monticello Raceway, and Leon Greenberg (447). The minutes of the Executive Committee meeting showed that Milton Kutsher acted as Chairman and after calling

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* Having the attendance sheets in front of him, Leon Greenberg knew that at least 168 men had attended the affairs on five different occasions at Grossinger's. Considering the golf fees and cart costs, lunch, and cocktails, dinner and golf balls, he knew that the affairs must have run close to $5,000. The average cost per man would have been about $30 (110, 111).

the roll, the following entry was made:

> "Mr. Greenberg discussed the Grossinger bill for all events, including parties for horsemen, golf tournaments, etc., and stated that he had negotiated a 25% discount in accordance with the admonishment of the Executive Committee previously and that the entire bill had been paid in full."

When the check in the amount of $4,856.16 was received by Grossinger's, it was posted under the account of Sullivan County Harness Racing Association. No other monies were received that year for outings by Grossinger's from the Raceway (60-67). Neither Leon Greenberg nor the Raceway had any reason to believe that the payment of these horsemen's outings, a legitimate business expense, would be deducted from Leon Greenberg's Bar Mitzvah bill. It is most significant that when the Raceway funds were received by Grossinger's, the gratuities listed on those bills were paid out to the employees who worked those outings! (67). It is hard to understand if the outings had not taken place, why the gratuities would have been paid to the employees.*

Nothing more happened in this case until January of 1974 when the New York State Organized Crime Task Force commenced an investigation of the Monticello Raceway.

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* The horsemen's bills, GX-1A-G, show gratuities for Grossinger help in the amount of $226.50, which was distributed to those employees.

The Raceway Investigation

In January of 1974, the New York State Organized Crime Task Force (Task Force), acting under authority of Executive Law §70-a launched an investigation into the running of superfecta races at the Monticello Raceway (22a). No indictments were returned accusing anyone of misconduct concerning the handling of superfecta races. When this phase of the investigation failed, the Task Force turned on Leon Greenberg and began looking into his personal affairs (22a). The Bar Mitzvah records were examined and Paul Grossinger contacted. He, in turn, conferred with his attorney, Lazarus Levine, a lawyer in Sullivan County, who disliked Leon Greenberg!* Lazarus Levine then took over the matter and dictated a letter of resignation for Paul Grossinger and advised him to return the Raceway's funds (206). Paul Grossinger, up until this moment, honestly believed he had done nothing wrong (206), but he acted on his lawyer's advice and resigned and returned the money (206). It was after that that he went to the Organized Crime Task Force and testified about these events under an alleged grant of immunity (181). And that is how this indictment came about.

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* All efforts to prove Lazarus Levine's hatred of Leon Greenberg were rejected by the court.

As indicated earlier, appellant's trial commenced on November 5, 1975 and after the jury deliberated for two days, the defendant was found guilty. During its second day of deliberation, the jury reported it was deadlocked, but the trial judge directed them to consider their verdict further (716, 723). And so ended a dark chapter in the history of criminal trials in the Southern District of New York. This appeal followed.

POINT I

THE EVIDENCE OFFERED AGAINST APPELLANT WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT THAT HE DEFRAUDED THE MONTICELLO RACEWAY BY USING THE MAILS OR CONSPIRED TO DO SO.

Seldom has there been so shocking and so unwarranted a conviction of a respected lawyer with an impeccable reputation for honesty upon such questionable evidence. The proof showed that Leon Greenberg knew the horsemen's outings took place and that the money paid by the Raceway for that purpose was properly expended. Paul Grossinger admitted that his decision to reduce the Bar Mitzvah bill by the amount paid for the outings was based on his "own conclusion." Obviously, Grossinger's misguided action was due to an unfortunate misunderstanding.*

Certainly it was never Leon Greenberg's intention to cheat the Raceway. He devoted his whole life to that enterprise and would not have done anything to harm it. Thus, the question which dominates this appeal involves the sufficiency of the evidence concerning appellant's conviction—an issue which presents a continuing challenge to this Court.

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* Clearly, when Leon Greenberg said that he had authority to handle the horsemen's billing in a certain fashion, he meant that the Executive Committee had approved payment for the outings even though Paul Grossinger may have thought they would be complimentary. The horsemen's parties held at other hotels were paid for by the Raceway (96, 240, 241).

For the government to have succeeded in this conspiracy prosecution, it was obliged to prove beyond a reasonable doubt an unlawful agreement, United States v. Floyd, 496 F.2d 982 (2d Cir. 1974), between two or more persons, United States v. Fleming, 504 F.2d 1045 (7th Cir. 1974), with a meeting of the minds to defraud the Raceway by using the mails, United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975)*. The test used in this circuit to measure the sufficiency of the evidence to support a conviction is " 'whether . . ., giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' " United States v. Frank, 494 F.2d 145, 153 (2d Cir. 1974), cert. denied, 419 U.S. 828 (1974). The fragile evidence of conspiracy and mail fraud in this case, as a matter of law, simply cannot satisfy this criteria.

Here, the only direct evidence of whether a conspiracy existed was the testimony of the unindicted co-conspirators, both of whom, on cross examination, disclaimed any wrongdoing. Bernard Roth denied ever conspiring with anyone to defraud the Raceway, and Paul Grossinger said, in unmistakable language,

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*Certainly, the cadence of these rules must have a familiar ring to this court.

he did not believe he did anything wrong when he reduced Leon Greenberg's Bar Mitzvah bill. Thus, the government witnesses were responsible for direct evidence which led to inferences contrary to those which the government desired that the jury draw.*

In United States v. Vasquez, 319 F.2d 381 (3d Cir. 1963), the defendant was charged with conspiring to marry a woman for the sole purpose of adjusting his immigration status. The defendant's wife, the alleged co-conspirator, testified for the government that at the time she really wanted to marry the defendant and would have been happy to live with him. Accordingly, it was held that a conviction for conspiracy could not be sustained as a matter of law. The Third Circuit stressed that "in view of the lack of agreement between the parties. . ., the essence of the conspiracy drops out" (319 F.2d at 387) and therefore the conviction must be reversed.

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*While we do not seek to revive the "long discredited notion" that the government is "bound" by the testimony of every witness that it calls, Rodgers v. United States, 402 F.2d 830 (9th Cir. 1968), the sheerest of circumstantial evidence of any alleged conspiracy introduced in this case was insufficient, as a matter of law, to contradict the only direct evidence showing the absence of a conspiracy. The operation of this principle is best illustrated by the Rodgers case. There, the government relied on the inference that if a car was stolen in one state and possessed in a second state, it may be inferred that the person who stole the car transported it to the second state and that the possessor knew it was stolen. Although it was necessary that the government establish that inference to sustain a conviction, the prosecution introduced evidence which tended to contradict that inference. Thus, the Ninth Circuit concluded the government did nothing to relieve itself of the effect flowing from that evidence.

Here, as in the Vasquez case, government witnesses specifically disavowed any participation in a conspiracy. Roth and Grossinger both repudiated the government's claims of an illegal agreement, and Leon Greenberg declared that the outings "definitely took place."* Since the essence of an alleged conspiracy, the underlying agreement, was not shown to exist, the conspiracy conviction cannot stand. Here, the record is barren of any proof contradicting the direct evidence showing that there was no agreement to defraud the Raceway. Thus, the conspiracy conviction must be reversed.

Recently this Court struck down, as a matter of law, conspiracy convictions unsupported by adequate evidence. In each of these cases, the proof was far more compelling than that presented here against the appellant.

United States v. Merolla, 523 F.2d 51 (2d Cir. 1975);

United States v. Freeman, 498 F.2d 569 (2d Cir. 1974);

United States v. Terrell, 474 F.2d 872 (2d Cir. 1973);

United States v. Infanti, 474 F.2d 522 (2d Cir. 1973);

United States v. Docherty, 468 F.2d 989 (2d Cir. 1972);

United States v. Farruzzi, 463 F.2d 683 (2d Cir. 1972);

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* It bears remembering that the government claimed the unindicted co-conspirators were granted full immunity. Thus, this is not a case where the government witnesses had every reason to enhance or protect the defense.

United States v. Hysohion, 448 F.2d 343 (2d Cir. 1971);

United States v. Steward, 451 F.2d 1203 (2d Cir. 1971);

United States v. Cantone, 426 F.2d 902 (2d Cir. 1970);

United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963)

In the Cianchetti case, this Court emphasized:

> "[K]nowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator. There must be something more than '[m]ere Knowledge, approval of or acquiescence in the object or the purpose of the conspiracy * * *." (citation omitted). This 'something more' is generally described as a 'stake in the venture.' '[I]n prosecutions for conspiracy * * * [the defendant's] attitude towards the forbidden undertaking must be more positive. * * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome.' (citations omitted).
>
> Rather than revealing a stake in the conspiratorial venture or an affirmative attempt to further its purposes, Cianchetti's statements of his intention were at least equivocal, at most clearly disclamatory.
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> * * *
>
> Cianchetti's motives may not have been wholly laudatory, but the fact remains that the evidence shows that he did indeed abstain. He did not cast in his lot with the conspirators, did nothing to further the success of the enterprise, and had no stake in its outcome. His conviction must be reversed" (315 F.2d at 588). See United States v. Kearse, 444 F.2d 62 (2d Cir. 1971).

Paul Grossinger's vague and ambiguous conversation with Leon Greenberg ten months before he "concluded" to reduce the Bar Mitzvah bill does not support an inference that this was done on Leon Greenberg's instructions. For that matter, he clearly stated that he never spoke to Leon Greenberg about that subject (189).

In United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), this Court overturned the conspiracy convictions of three stock brokers where the government's evidence was insufficient to prove guilty knowledge for the sale of millions of unregistered securities. There the court, in a fierce opinion, declared:

> "The scanty extrinsic evidence produced by the government against these defendants implies guilt only if we first assume guilty knowledge and purpose; when used to prove that basic element of the crime it is neither substantial nor convincing" (294 F.2d at 942-43).

Can it be truly said that the prosecution proved beyond a reasonable doubt that these horsemen's outings did not occur? If Leon Greenberg knew the outings occurred, then clearly there could be no criminal intent as a matter of law.

The proof on this issue is unassailable. The avalanche of evidence establishing that the horsemen's outings took place, coming from such unimpeachable sources as former employees of Grossinger's, the maitre d' at Grossinger's, the horsemen, the golf pro, and even Paul Grossinger himself, leads to the irresistible conclusion that there was never any intent or agreement to defraud the Raceway but merely a misunderstanding between Paul Grossinger and Leon Greenberg. Paula Bergman's pathetic attempt to levitate the prosecution's case, measured against this mountain of evidence, is simply incredible. Her questionable assertion that the outings did not take place was based upon a lack of records and not her personal knowledge.

In United States v. Docherty, 468 F.2d 989 (2d Cir. 1972), this Court reversed an attorney's conviction for conspiracy to defraud a federally insured bank although Docherty actually signed the application for the loan. In reversing Docherty's conviction and dismissing the indictment, this Court decided that the government failed to prove that he had agreed to wilfully misapply bank funds or to defraud a bank officer.

In the wake of this impressive wave of cases, Leon Greenberg's conviction must be swept aside. The instant case

illustrates better than any other the hazards inherent in a conspiracy prosecution. The need for strict adherence to the firm rules forged by this Court, impelled by a desire to shield the innocent from being unjustly convicted under this perilous doctrine, is here well demonstrated. For all these reasons, the appellant's conspiracy conviction should be reversed and the indictment should be dismissed.

Mail Fraud

In 1962 this Court set about mapping the tangled territory of mail fraud prosecutions in United States v. Baren, 305 F.2d 527 (2d Cir. 1962). There the Court stressed:

> "In every mail fraud case, there must be a scheme to defraud, representations known by defendant to be false and some person or persons must have been defrauded" (305 F.2d at 528).

Significantly, this Court's formula is stated in the conjunctive form, meaning that the prosecution cannot prevail unless all three elements are satisfied. In addition, the use of the mails must be an essential part of a scheme under Section 1341. Cf. United States v. Maze, 414 U.S. 395 (1974); Pereira v. United States, 347 U.S. 1 (1954);

Kann v. United States, 323 U.S. 88 (1944). In this case, the government's proof fell far short of these required elements.

First, there was no scheme to defraud. No evidence was produced indicating that Leon Greenberg instructed anyone to reduce the Bar Mitzvah bill by the amount of money paid for the horsemen's outings. He never saw Grossinger's ledger cards which contained the charges for the Bar Mitzvah; the bill he received for the Bar Mitzvah in the amount of almost $6,000 was not itemized; he had not talked to Paul Grossinger for over nine months before Grossinger unilaterally reduced the Bar Mitzvah bill; and, most importantly of all, it was established that the horsemen's outings actually occurred.

Consequently, how could there be any scheme to defraud the Raceway when in fact the outings took place? Section 1341 imposes upon the government the burden of proving beyond a reasonable doubt that some actual harm or injury was contemplated by the alleged scheme to defraud. United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970). The government was unable to mount any evidence contradicting the massive proof

establishing the horsemen's outings. The government merely showed that it was unable to locate any records of golf carts used for the outings. However, that failure was successfully explained by the golf pro who indicated that these records were not kept with the regular guest files.

The Court must also ask itself the question whether there are any limits which will be imposed upon the misuse of the mail fraud statute in this nation. In an unbroken series of cases extending over a long stretch of the Supreme Court's history, it has been held postulate that in order to violate Section 1341 the use of the mails must be "incident to an essential part of the [illegal] scheme." Pereira v. United States, 347 U.S. 1 (1954); United States v. Maze, 414 U.S. 395 (1964); Kann v. United States, 323 U.S. 88 (1944). In Kann, the Court struck down a mail fraud conviction and stressed that that law is not a net upon which federal prosecutors can rely, irrespective of the character, timing, purposefulness and guilty knowledge of the use of the mails.*

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* The Court in Kann declared:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law" (323 U.S. at 95).

Applying this well-reasoned rule to our case compels a conclusion that the indictment must be dismissed. It is apparent from the language of the indictment that this alleged plan to defraud the Raceway in no way depended upon the use of the mail. Grossinger's is located only ten miles from the Monticello Raceway.* Consequently, the employment of the mails was never contemplated and was totally unnecessary to advance the government's grand theory of fraud. Certainly, if a person using a stolen credit card in Louisiana cannot be convicted of mail fraud when he knows full well that his charges will be returned to his home state, then under the pathetic circumstances of this case, a mail fraud charge cannot be mounted. Thus, both the substantive and conspiracy counts of the indictment must be dismissed as a matter of law.**

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* In fact, Robert Schoonmaker testified that some bills from Grossinger's, including bills for golf outings, were often hand-delivered to the Raceway, as opposed to being mailed (213, 215).

** Recently, the Supreme Court brought to a halt the alarming trend of over-extending federal criminal statutes in this country. Rewis v. United States, 401 U.S. 808 (1971); United States v. Bass, 404 U.S. 336 (1971); United States v. Maze, supra. This Court lashed out at prosecutors, who contrived federal crimes in order to drive their victims into federal court, admonishing them against this practice. United States v. Archer, 486 F.2d 670 (2d Cir. 1973). Certainly this case comes well within the reach of these decisions requiring a dismissal of the indictment because of the over-extension of the mail fraud statute. If such a construction were to be approved, it would drag within the undertow of this section thousands of petty cases where something collateral to the transaction was sent through the mail.

Certainly, without regard to any other argument, counts 4 and 5 under no circumstances can be sustained. To support a conviction under Section 1341, the mailing must be in furtherance of the alleged fraudulent scheme. United States v. Keane, 522 F.2d 534 (7th Cir. 1975). Also, a mailing which occurs after the completion of the fraud is not criminal under the mail fraud statute, United States v. Maze, supra; Strauss v. United States, 516 F.2d 980 (7th Cir. 1975).

Here the mailings which formed the basis of both counts 4 and 5 were not in furtherance of any alleged scheme. The purported object of the alleged scheme was to pay the Bar Mitzvah bill with corporate funds. This was fully accomplished by October 29, 1970 and any further mailings were too remote from the scheme to constitute culpable conduct. Moreover, the mailings of April 6, 1971 (the letter asking for verification of the bill) and July 13, 1971 (the sending of the personal check to pay the Bar Mitzvah bill) occurred months after any claim of misconduct reached fruition. The transaction was fully completed upon the Executive Committee's authorization of payment and the later mailing served no purpose in that regard.

Under these compelling authorities, the appellant's conviction is indefensible. Accordingly, it should be reversed and the indictment should be dismissed.

POINT II

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE COURT MIS-INSTRUCTED THE JURY ON THE FOLLOWING MATTERS:

(a) ON THE APPELLANT'S THEORY OF DEFENSE;

(b) THAT GROSSINGER AND ROTH WERE ACCOMPLICES AS A MATTER OF LAW AND ERRONEOUSLY DESIGNATED THEM AS "CO-CONSPIRATORS";

(c) ON THE RULE OF REASONABLE DOUBT BY STATING A REASONABLE DOUBT IS A "SUBSTANTIAL DOUBT";

(d) ON THE ISSUE OF GROSSINGER'S AND ROTH'S IMMUNITY.

A number of critical errors committed by the trial judge profoundly affected the appellant's defense and require a reversal of his conviction. Each of these errors, which reach due process proportions, should be discussed separately.

Theory of Appellant's Defense

The central theme of the appellant's defense was that the horsemen's outings actually occurred and, therefore, the Raceway was not defrauded by the payment of that expense. This is so no matter what Grossinger and Roth believed. Thus, the Court's instructions on this critical issue achieved paramount importance. Accordingly, counsel requested the Court to advise the jury as follows:

> "The prosecution is obliged to convince you beyond a reasonable doubt that no services were rendered by Grossinger's for any horsemen who used their facility. If you should have a reasonable doubt in

> your mind that horsemen did, in fact, use their facilities and Leon Greenberg believed that funds were due and owing to Grossinger's, then you cannot find him guilty of conspiracy or the substantive offense of mail fraud."*

Counsel excepted to the Court's rejection of this requested instruction (524). The failure to give this advice to the jury imposed a cruel handicap on the appellant's defense. The magnitude of this error places it beyond appellate redemption.

In United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), this Court, acting under the able leadership of Judge Moore, concluded that, although it is not essential that victims under §1341 be in fact defrauded, "this does not mean that the government can escape the burden of showing that some factual harm or injury was contemplated by the schemer." 421 F.2d 1180. This Court stressed that the purpose of the scheme "must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out," quoting from Horman v. United States, 116 F. 350, 352 (6th Cir. 1902), 421 F.2d at 1181.

It is reversible error not to instruct a jury on a defendant's theory of defense which is supported by some evidence. United States v. Swallow, 511 F.2d 514 (10 Cir. 1975); United States v. Noah, 475 F.2d 688 (9th Cir.), cert. denied, 414 U.S.

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* Request No. 13 contained in Defendant's Requested Jury Instructions marked Court Exhibit 2 (792).

1095 (1973). On this basis, a number of appellate courts have reversed convictions where a court failed to instruct the jury on the theory underlying appellant's defense.* The defendant is entitled to have the jury consider any theory of defense which is supported by the law and the evidence — however tenuous. United States v. Bessesen, 445 F.2d 463 (7th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Vole, supra. In the present case, Mr. Greenberg's theory — indeed the whole thrust of his defense — was that, if the horsemen's outings did, in fact, exist, then no fraud had been committed.**

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* See, e.g., United States v. Mitchell, 495 F.2d 285 (4th Cir. 1974) Refusal to instruct an agency defense in prosecution for filing tax return was reversible error, as general instructions on good faith were insufficient; United States v. DeMarco, 488 F. 2d 828 (2d Cir. 1973) failure to charge that essential element of crime was defendant's knowledge of interstate character of stolen goods was error; United States v. Terrell, 474 F.2d 872 (2d Cir. 1973) conviction in narcotics prosecution reversed where defendant requested, and judge refused, charge that mere presence and guilty knowledge were not enough, that they must find that defendant participated in transaction; United States v. Vole, 435 F.2d 774 (7th Cir. 1970) where theory of defense was that defendant had been framed by co-conspirators, refusal to give instructions on this theory was reversible error.

** The mail fraud statute requires that the government establish a specific intent to defraud on the part of the defendant in order to sustain a conviction. United States v. Klein, 515 F.2d 751 (3d Cir. 1975); United States v. Kyle, 257 F.2d 559, (2d Cir. 1958), cert. denied, 358 U.S. 937 (1959). If the defendant's acts were done in good faith, without an intent to defraud, the government cannot sustain its burden of proof. United States v. Sheiner, 273 F. Supp. 977 (S.D.N.Y. 1967), aff'd, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825 (1969). It is not sufficient for the government merely to establish that representations were made. United States v. Koenig, 388 F. Supp. 670 (S.D.N.Y. 1974).

If the jury found that the horsemen's outings did, in fact, occur, then clearly there could not have been an intended victim of the alleged scheme. The Raceway could not have been defrauded by authorizing payment for bills which were legitimate corporate debts. Since the requested instruction went directly to the issue of intent to defraud, the general instructions as to good faith were insufficient to convey to the jury the defendant's theory of the case. See United States v. Bessesen, supra, (where the court held that the defendant in a mail fraud case was entitled to instructions that, if he had a reasonable expectation that sufficient funds would be deposited in time to cover checks in an alleged check-kiting scheme, the jury must find him not guilty).

Recently, this Court in United States v. Singleton, Nos. 75-1114, 75-1209, 75-1210 (2d Cir., Feb. 13, 1976), held that a charge that removed an essential element of the offense from the jury's consideration required that the conviction be reversed. This case is similar to our own in that the trial judge repeatedly referred to "stolen checks" and declined to instruct the jury that it must find that the checks had in fact been stolen. In Singleton, the proof of guilt was overwhelming while here it was most sheer. Accordingly, Singleton should persuade this Court to reverse the appellant's conviction. See also United States v. Natale, F.2d (Slip Op. No. 793, 1976); United States v. Bright, 517 F.2d 584 (2d Cir. 1975); United States v. Cangiano, 491 F.2d 906 (2d Cir. 1974); United States v. Houle, 490 F.2d 167 (2d Cir. 1973).

Since the bills for the horsemen's outings represented a legitimate corporate debt, Leon Greenberg, as a matter of law, could not have intended that the Raceway incur injury through the payment of these bills. Appellant was entitled to have the jury consider this defense, and the failure of the trial judge to so charge constituted reversible error.

The Misinstruction that Grossinger and Roth were Accomplices as a Matter of Law

The Court grievously erred in advising the jury that Paul Grossinger and Bernard Roth were "co-conspirators and accomplices" (649). In advance of the trial, counsel complained about this onerous designation in the indictment (69a).* In reading the indictment to the jury the court denounced Paul Grossinger and Bernard Roth as co-conspirators on 19 occasions (648, 653). Furthermore, the court inaccurately stated that both Paul Grossinger and Bernard Roth "admittedly participated in the acts charged in the indictment as crimes" (640, emphasis supplied). Both Bernard Roth and Paul Grossinger denied any wrongdoing charged in the indictment (152, 206). Nevertheless, the court went on to tell the jury that they must be considered accomplices (640).** Counsel objected to this instruction (673, 675). This

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* Refers to the pages of the defendant's omnibus motion filed on July 21, 1975.

** The court never notified counsel that it was going to denominate Roth and Grossinger as accomplices as a matter of law. Counsel never requested the court to charge that either Grossinger or Roth were accomplices (777-803).

repeated assailing of Grossinger and Roth as accomplices and co-conspirators was highly prejudicial and unauthorized.

The grand jury fulfilled its investigative purpose by accusing Leon Greenberg of an offense. Beyond that, the grand jury had no authority to designate other persons as co-conspirators. Its powers are not defined in the Constitution or by Congress, but rather are delineated by the federal courts. These well-defined functions do not include predatory, public accusations directed at persons not named as defendants.

There is absolutely no authority allowing a federal grand jury to issue a report accusing persons not indicted of criminal conduct. There is no power for a grand jury to achieve by indictment what it cannot do by issuing a public report. In United States v. Briggs, 514 F.2d 794 (5th Cir. 1975), the fifth circuit, in an unimpeachable decision, declared:

> "We have found no reported opinion or scholarly commentary, and the government suggests none, contending that a federal grand jury is empowered to accuse a named private person of crime by means of an indictment which does not make him a defendant . . ." (514 F.2d at 801).

The Briggs opinion combines dramatic narrative with a scholarly treatise on the powers of grand juries. The bright glare from this fearless opinion has lit up the whole legal firmament of grand jury proceedings. The fifth circuit, without flinching, finally concluded:

> "The grand jury has been variously viewed as an arm of the court, as an instrumentality of the people, and as an adjunct of the judiciary but with the power to act, within certain bounds, independently of the traditional branches of government. We conclude, without the necessity of adopting a particular characterization, that a federal court has the power to expunge unauthorized grand jury action" (514 F.2d at 806-07).

Although in the Briggs case, the unindicted co-conspirators moved to have their names expunged from the indictment, the principle applies with equal force here. The harm occasioned by the court in repeatedly describing Grossinger and Roth as co-conspirators, seared into the minds of the jurors their unproven complicity which inevitably, wrongly inculpated Leon Greenberg.

The defense urged throughout the trial that no one had committed any criminal acts and that the outings had actually taken place. Counsel tried to prove that the charges against Leon Greenberg stemmed from attorney Lazarus Levine's intense dislike for him. Levine prompted Grossinger to color innocent acts as criminal.

Thus, it was absolutely devastating to have the government's two leading witnesses, who gave testimony favorable to the defense, impugned as accomplices and co-conspirators. The jury was left with the distinct impression that since Grossinger and Roth were conspirators and accomplices, the defendant must

have been implicated also. For that matter this repeated denouncing of the witnesses as accomplices must have detonated the jury's worst prejudices and caused them to come back and ask the understandable question why these two men were not prosecuted if they were in fact co-conspirators and accomplices (694).

The Briggs decision sounds a clarion of rationality during a time when grand juries throughout the country have ravaged thousands of witnesses, assaulting them as "unindicted co-conspirators" and leaving them homeless and searching for a rule to rescue them from this calamity. This craven practice has gone on without any legal consensus for too long.

The Court must not be lured away from this significant issue by the prosecution's siren song that it has always been done that way in this district. We are proud to acknowledge that recently our courts have bravely ventured down the mean streets of grand jury malpractices and have been appalled by what was seen. A new testament is now being written bringing to a stop these subversive grand jury practices.* The Briggs case is compatible with this philosophy and advances its objectives.

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* This circuit has halted the misleading use of hearsay before grand juries in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); it has also foreclosed grand juries from acting beyond the end of its 18-month statutory life, United States v. Fein, 504 F.2d 1170 (2d Cir. 1974); McClure v. County Court of the County of Dutchess, 41 A.D.2d 148, 341 N.Y.S.2d 855 (2d Dept.

In a case as close as this, there was no excuse for drenching the jury with the constant designation of two helpful witnesses as accomplices and co-conspirators. The jury was left with the impression that since the other two persons must have committed the crime, the defendant did also. The defendant's presumption of innocence was severaly lacerated by these unfortunate and relentless remarks.

The establishment of fair trials is one of the most cherished policies of our civilization. Surely good common sense and logic require that this regrettable practice be discontinued. There is absolutely no authority for it, and it

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(cont'd)

1973). Other courts have required the legal instructions given to grand juries to be recorded, People v. Percy, 45 A.D.2d 284, 284, 358 N.Y.S.2d 434 (2d Dept. 1974), aff'd N.Y.2d , N.Y.S.2d (Jan. , 1976). New York courts have now insisted that legal instructions furnished grand juries must be accurate, People v. Mackey, 371 N.Y.S.2d 559 (Suffolk County Ct. 1975); People v. Ferrara, 370 N.Y.S.2d 356 (Nassau County Ct. 1975); People v. Lawson, 374 N.Y.S.2d 270 (Sup.Ct. 1975). The California Supreme Court has held that a prosecutor has a duty to inform a grand jury about exculpatory evidence, Johnson v. Superior Court, 18 Crim.L.Rptr. 2054 (Sept. 19, 1975). The abuse of grand jury process is being stopped, United States v. Dardi, 330 F.2d 316 (2d Cir. 1964); United States v. Fisher, 455 F.2d 1101 (2d Cir. 1972); In re grand jury subpoena of Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975). Prosecutorial misconduct before grand juries is being halted, United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974); as is knowingly presenting perjured testimony before a grand jury, United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); see also Frankel and Naftalis, Grand Jury—An Institution on Trial, THE NEW LEADER, November 10, 1975, Vol. LVIII, No. 22; The New York State Investigation Commission conducted hearings in New York City and Buffalo, New York, in January of 1976 concerning grand jury leaks.

does not warrant approval.* The Briggs rule should be installed in this circuit. For all these reasons, the appellant's judgment of conviction should be reversed and a new trial should be granted.

The Court Misadvised the Jury That a Reasonable Doubt was Equivalent to a "Substantial" Doubt

Another unsettling question presented by this appeal involves the trial judge's misinstruction on the doctrine of reasonable doubt. The court advised the jury:

> "A reasonable doubt is one that arises out of the evidence in the case or the lack of evidence. It is a doubt which is substantial and not merely shadowy" (635).

Counsel specifically objected to this charge (673). The jurors, after deliberating for over a day, asked to hear, once

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* If this Court were to decide that it is still appropriate to designate a person in an indictment as "an unindicted co-conspirator," certainly it should hold that it is inappropriate to read that language to the jury. As for the instruction on the accomplice rule, this should never be given automatically. This advice is similar to that of the defendant taking the witness stand. The views of lawyers differ as to the advantage or disadvantage of that instruction. Consequently, most federal judges will seek permission to give the instruction or otherwise withhold it. The same rule should apply to the accomplice instruction. It is this lawyer's view that a defendant in the federal courts profits very little from the accomplice instruction since there is no requirement of corroboration. What is much more devastating is to have the jury told that witnesses are accomplices, implying the defendant's guilt.

again the judge's "interpretation" of a reasonable doubt (693). The court repeated the above instruction (721). This provocative event did the most to ruin the defendant's case. This version of the reasonable doubt instruction is constitutionally unacceptable.

In 1967 this Court acceded to a charge wherein a reasonable doubt was defined as "a doubt based on reason," "a substantial doubt." Significantly, in that case the trial judge advised the jury that "you must be satisfied of the defendant's guilt to a moral certainty before you can convict." United States v. Aiken, 373 F.2d 294 at 299 (2d Cir. 1967).* The Aikin case is the only decision where this Court went along with the "substantial doubt" instruction. However, recent years have seen the boundaries of "proof beyond a reasonable doubt" expanded. Our courts have displayed a remarkable change in posture toward that concept.

In 1970 the Supreme Court of the United States reaffirmed its devotion to the constitutional proposition that a criminal charge must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). There the Court, in majestic language, proclaimed:

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* In acquiescing in this charge, the court cited United States v. Heap, 345 F.2d 170 (2d Cir. 1965) and United States v. Davis, 328 F.2d 864 (2d Cir. 1964). In neither of those cases was the language "substantial doubt" ever used.

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence. . . . [I]t 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'
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> * * *
>
> "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty" (397 U.S. at 363-64; (emphasis supplied).

The Winship proclamation has substantially undermined Aiken's authority and should persuade this Court to re-examine the "substantial doubt" virus which will undoubtedly spread throughout other charges in this Circuit.

The Court must ask itself the question: Should the substantial doubt principle become a permanent instruction in this Circuit? If the Court is convinced that it should be, then it should say so. But then the Court must be prepared to accept all the implications of such a judgment. For what the Court does here today will endure for many years to come and will drastically depreciate the constitutional safeguard of "proof beyond a reasonable doubt."

Nowhere in any of the Supreme Court's pronouncements on reasonable doubt or, for that matter, in this Court (with the exception of Aiken) is there the slightest suggestion that a juror must have a "substantial doubt" to entitle a defendant to an acquittal. Such an instruction overstates the degree of uncertainty required for a reasonable doubt. A juror might well have a doubt that is reasonable, under all the circumstances of a case, but in his mind it may not be "substantial." The layman's understanding of the term "substantial" is that of being great, significant, or large. These terms are not compatible with "reasonable."*

The "reasonable doubt" injunction mandates that the prosecution must overcome all of the jury's reasonable doubts—not "substantial doubts"—before a citizen can be condemned forever

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* In Missouri v. Davis, 482 S.W.2d 486, 490 (Mo. 1972) Justice Seiler of the Missouri Supreme Court, in a concurring opinion, observed:

> "Reasonable" and "substantial" are not synonymous, as can be seen by referring to any of the standard dictionaries. The point was well put by counsel in argument recently where he pointed out that if one had to undergo a serious operation and were querying the doctor as to the prospects for a successful outcome, how differently the person would feel if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success."

to a criminal conviction. The practical effect of the "substantial doubt" direction is the unauthorized power it gives a convicting juror to shout down uncertain jurors by declaring "the judge says your doubt has to be substantial!" Certainly such a charge puts jurors who are unconvinced at a decided disadvantage. Requiring a dissenting juror to overcome a "substantial" doubt cannot be reconciled with all that has been said by the Supreme Court on the doctrine of reasonable doubt. Intrusion of the term "substantial" into this rule wreaks havoc with the principle on which our notion of proof beyond a reasonable doubt rests.

Since this Court decided Aiken, other circuits have rejected the "substantial doubt" precept. United States v. Bridges, 499 F.2d 179 (7th Cir. 1974); United States v. Atkins, 487 F.2d 257 (8th Cir. 1973); United States v. Alvero, 470 F.2d 981 (5th Cir. 1973); United States v. Christy, 444 F.2d 448 (6th Cir. 1971).*

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* In Christy, the court declined to reverse because of the district court's overall charge on reasonable doubt, but declared, "Were this the District Court's only reference to or explanation of the concept of reasonable doubt, the unfortunate inclusion of the questioned word would present an issue of some magnitude" (444 F.2d at 450). See also United States v. Gratton, 525 F.2d 1161 (7th Cir. 1975), where the court approved the charge "A 'reasonable doubt' means a doubt based on reason and it must be substantial rather than speculative. . . ." Since no objection was registered to this instruction, the court declined to reverse the conviction.

This Court and others have traditionally been intolerant of any deviation from the generally accepted reasonable doubt charge, United States v. Byrd, 352 F.2d 570 (2d Cir. 1965); Boatright v. United States, 105 F.2d 737 (8th Cir. 1939), although some courts have held that the term reasonable doubt need not be defined.

Today more than ever we must acknowledge that any person facing the awesome force of a federal prosecution is in great jeopardy even when innocent. Thus, the constitutional emblem of proof beyond a reasonable doubt is desperately needed to protect defendants exposed to the inclemencies of a law-and-order mood which is reaching epidemic proportions in this nation. That great barricade must be refortified to protect defendants against jurors who are forced to live in a world filled with wailing sirens, drop locks and meaningless violence.

The only antidote a defendant has against these fears, which prowl the jury deliberation room in large cities, threatening the security of dispassionate verdicts, is the reasonable doubt parole. This case provides the Court with an excellent vehicle to reclaim that constitutional safeguard from the ruins of Aiken. A continued policy of appeasement will bring about the downfall of this great rule.

In this close case, Leon Greenberg's fate trembled in the balance for two days while the jury deliberated.* Then, at a critical moment in the life of this trial, the jurors asked for an explanation of reasonable doubt and were met with the "substantial doubt" mandate. At that moment the defendant's conviction was ordained and this case was destined to reach this Court.

Under the centrifugal force of Winship and the authorities contained in this brief, the highly unpredictable word "substantial" should be forever cleansed from the reasonable doubt edict. For all the reasons, the Court should reverse the defendant's conviction and grant a new trial.

The Misadvice on the Issue of Immunity

During the jury's second day of deliberations, a note was sent to the court asking for further instructions on Roth's and Grossinger's immunity (693). After a long debate between counsel, the court instructed the jury, over defense counsel's objection, (723) as follows:

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* This Court stressed in United States v. Persico, 305 F.2d 534 (2d Cir. 1962) that in close cases errors which normally would not be considered reversible must be scrutinized much more carefully.

"The only case before this jury at this time is the case of Leon Greenberg. Punishment of others, if there is to be any, the trial of others, if there is to be one, punishment of Greenberg, if the Court is required to impose any, must not on your oath interfere with or divert you from rendering a verdict in accordance with the evidence in this case as you swore, so help you God" (719-20).*

These unfortunate remarks suggesting the possible future prosecution of the unindicted co-conspirators not only tended to prejudice the defendant, but also induced the jury into reaching a guilty verdict. The tragedy of these instructions lies in the acknowledgement by the government that neither man would ever be prosecuted. Furthermore, the statute of limitations had expired on both substantive and conspiratorial offenses. Counsel complained at the very inception of the trial about any discussion of immunity in the jury's presence (17-19). He objected to the government developing this subject with the witnesses Roth and Grossinger (18). The intrusion of this issue into the trial warrants a reversal of appellant's conviction standing alone. However, the error was compounded by the court's mismanagement of this problem with the jury when it finally erupted during their deliberations.

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* The court also, over defense counsel's objection, read portions of the United States Attorney's opening; defense counsel's opening; testimony of Bernard Roth and Paul Grossinger relating to their understanding of the immunity they obtained (724).

The appellant is aggrieved by these instructions because (1) the information was clearly erroneous, i.e., neither Roth nor Grossinger would ever be prosecuted; (2) the advice must have had an impact upon the jury's appraisal of the credibility of the prosecution witnesses; (3) the court's answer tended to influence the jury into believing that the witnesses did, in fact, engage in wrondoing, and might well be tried and punished; (4) and finally, the court's unfortunate statement that "punishment of Greenberg, if the court is required to impose any" suggested that there might not be any punishment (720).* Certainly in this last situation, the court should have instructed the jury that the matter of punishment, if the defendants were found guilty, is solely a matter for the courts.

The court must take great care in all dealings with a jury once deliberations have begun but before a verdict is reached. The judge must not take any action which may tend to prejudice the defendant, cf. United States v. Martin, 525 F.2d 703 (2d Cir. 1975), or which might coerce the jury into reaching a result. Cf. United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975).

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* Although Leon Greenberg was placed on probation, he has lost everything. He was forced to resign his office as President of Monticello Raceway and now faces disbarment. Surely that is punishment in every sense of the word. To indicate that he may not be punished was inexcusable.

Although the judge properly instructed the jury that the fate of the unindicted co-conspirators was not their concern, it was plain error to imply that future prosecutions remained possible. The indication that future charges might be forthcoming must have been viewed as a compromise between punishing the defendant for the acts of three men and an outright acquittal.*

In United States v. Hall, 245 F.2d 338 (2d Cir. 1957), the jury inquired as to whether they could recommend leniency for the defendants. The judge properly responded that the sentencing function was "of no concern to the jury" but he then added that they could indeed recommend leniency, and that they could be sure that it would be acted upon accordingly. In reversing the conviction, the court pointed out it could not be

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* In this sense, that response might have compromised the doubts of the jury, thereby inducing a verdict. The present situation may be analogized to that involving the issue of the jury being concerned with the sentencing of the defendant. United States v. Patrick, 494 F.2d 1150 (D.C. 1974); United States v. McCracken, 488 F.2d 406 (5th Cir. 1974); United States v. Glick, 463 F.2d 491 (2d Cir. 1972); and Smith v. United States, 230 F.2d 935 (6th Cir. 1956). These decisions indicate that, when the jury requests information concerning a matter irrelevant to their deliberations, the judge should merely inform the jury that such information is none of their concern. He should not provide them with information that might tend to influence their verdict in any manner.

sure that the judge's assurances had not influenced the jury's verdict.*

Here, as in the Hall case, the implication of future prosecution of the unindicted co-conspirators could have "soothed the consciences" of the doubting jurors into agreeing to vote for conviction. Also, the misleading statement by the trial judge that punishment might not be imposed could have accelerated a verdict of guilty. This Court cannot say that the implication of future prosecutions could not have had this effect. Thus, the conviction must be reversed and a new trial should be granted.

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* This Court stressed:

> "We cannot say that, under these circumstances, no juror holding out for acquittal was led to abandon his position by the judge's assurance that a recommendation for leniency would be acted upon. More than likely, one or more jurors entertaining doubts as to appellants' guilt agreed to vote for conviction because they had it in their power to soothe their consciences by causing little or no punishment to be imposed" (245 F.2d at 341).

POINT III

IT WAS REVERSIBLE ERROR NOT TO HOLD A HEARING ON APPELLANT'S COMPLAINT THAT ILLEGALLY SEIZED EVIDENCE WAS USED IN THE FEDERAL PROSECUTION.

Lurking immediately beneath the surface of this case is a question of Constitutional proportion sadly neglected by the Court below. Evidence illegally acquired by the State permeated the federal prosecution and fatally tainted it. To fully understand the appellant's complaint that the evidence, insufficient though it is, in support of his conviction was the fruit of the illegal activities of the New York State Organized Crime Task Force ("Task Force") requires a brief statement of the facts relative to the earlier investigation.

In January of 1974 the Task Force launched an investigation into alleged irregularities in the running of superfecta races at the Monticello Raceway as well as other racetracks in New York State. The 18-month investigation ended without anyone being charged with any misconduct.*

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*The Raceway has never been charged with any misconduct by the New York State Harness Racing Commission, the Federal and State Securities and Exchange Commissions, the State Liquor Authority, the Department of Labor, the State Department of Taxation, or the United States Internal Revenue Service, all of whom have jurisdiction over the Raceway (22a).

However, the Task Force, undaunted by this failure, veered off in a different direction and began rummaging through the personal affairs of Leon Greenberg. In its efforts to obtain information about him, the Task Force served subpoenas upon various members of the Raceway's Board of Directors on June 24, 1974. Applications were immediately made to quash the subpoenas because the records sought were irrelevant to any investigation which the Task Force was authorized to conduct. Justice Harold Hughes, of the Supreme Court of Albany County, quashed the subpoenas on the grounds that the Task Force's inquiry was unauthorized in that its investigation did not involve organized criminal activity that crossed county or state lines.

The Appellate Division, Third Department, unanimously upheld Justice Hughes' well-considered decision. Sussman v. New York State Organized Crime Task Force, 48 A.D.2d 154, 368 N.Y.S.2d 588 (3d Dept. 1975). The matter is now pending before the New York Court of Appeals having been argued on January 8 of this year.

However, while Justice Hughes' decision was being appealed by the Task Force, the records seized from the Raceway were impounded by the State authorities. This evidence was turned over to the United States Attorney for the Southern District of New York and submitted to the grand jury which indicted Leon Greenberg. The use of this poisoned evidence by the Government was challenged in the appellant's omnibus motion filed in advance of his trial. The Court denied a hearing on this issue and did not discuss in any way the rejection of this complaint (3a).

Leon Greenberg's motion to suppress the evidence turned over to the federal grand jury should have been granted on the grounds of the "fruit of the poisonous tree" theory.

In the landmark decision of Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Government had seized "without a shadow of authority" the defendant's books, papers and documents. Pursuant to a court order, the defendant secured the return of its items; however, the Government had photographed the documents while they were in its possession and used the photographs to obtain a subpoena requiring

the defendant to produce the originals at trial. The Court reversed the judgment stating:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" (251 U.S. at 392).*

In the instant case, the appellant would have been able to show that the bulk of the evidence submitted to the federal grand jury was gathered unlawfully by the State investigatory agency. Even the testimony of Paul Grossinger was illegally acquired through this unauthorized investiga-

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*Silverthorne was followed by Nardone v. United States, 308 U.S. 338 (1939), where the court refused to permit the prosecution to avoid an inquiry into its use of information gained by illegal wiretapping noting that:

> "Here, as in the Silverthorne case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively " (308 U.S. at 341; emphasis supplied). See also Wong Sun v. United States, 371 U.S. 471 (1963).

tion and should have been unavailable to the federal government as well as that of Bernard Roth.

In Elkins v. United States, 364 U.S. 206 (1960), the Court defined the question as follows: "May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced . . . in a federal criminal trial?" (364 U.S. at 208). In holding that evidence obtained by state officers during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial, the Court noted:

> "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's efforts to assure o' edience to the Federal Constitution.
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> * * *

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered" (364 U.S. at 221-22).

There can be no doubt that the Elkins prohibition of the use of evidence procured by unlawful search and seizure conducted by state officials applies equally to evidence obtained through the use of illegal state subpoenas.

Recently, in United States v. Birrell, 470 F.2d 113 (2d Cir. 1972), this Court, in a similar case, suppressed evidence unlawfully acquired by the Government from state officers and dismissed the indictment. In Birrell papers and records were seized from an apartment occupied by the defendant's girl friend in pursuit of a

murder investigation. Since the federal government was interested in Birrell, a legendary figure in this Circuit, it dispatched a federal agent to examine the records held by the police. The special agent found several documents which ultimately led to Birrell's indictment for perjury. Since the Government did not acquire a proper warrant to obtain this information, the Court concluded that the evidence must be suppressed and the indictment had to be dismissed.

Our situation is no different. We would have been able to show that the Government's whole case in this prosecution was originally assembled by the State Task Force in a proceeding later determined to be unlawful because that agency was acting outside its jurisdiction.* United States v. Hunt, 496 F.2d 888 (5th Cir. 1974).

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*In United States v. McSurely, 473 F.2d 1178 (D.C. Cir. 1972), the Court of Appeals held that where sub-committee subpoenas (which formed the basis of a contempt charge) were based on an investigator's illegal seizure of defendant's property obtained by state officials through an unconstitutional search, the evidence should have been suppressed. The McSurely case resembles our own and should compel this Court to reach the same conclusion.

Here the government plunged into these protected precincts without regard for the consequences. They must now bear the responsibility for that misadventure. For if these gross violations of the Fourth Amendment are ignored, the deterrant effect of our constitutional rules governing unlawful searches by both the state and the federal government will be significantly undermined. Lurking in the dark shadows of these low-visibility searches is a threat to every man's security and privacy. For all these reasons the evidence should be suppressed and the indictment dismissed.

CONCLUSION

Once again this Court is faced with the grim reality of rescuing a man from the clutches of an unjust conviction. Those who go to trial today in this pervasive climate of law and order, which is sweeping this country, face the risk of conviction even when innocent. Consequently now more than ever it is imperative that courts adhere to the rules forged by our forefathers designed to protect all men from an unwarranted conviction. These rules are the product of a civilization which, by respecting the rights of all its citizens, rich or poor, raises the stature of each of us and builds a sense of confidence in our government. Leon Greenberg's conviction represents an indefensible departure from these Constitutional safeguards. There is not a trace of responsible authority which supports this judgment. The acknowledgment that the appellant has been condemned to a felony conviction and now risks disbarment on this transparent proof, is reason enough to reverse his conviction. However, of much greater importance is the awesome realization that such an unwarranted judgment inevitably affects the integrity of our

whole judicial system. For if any man can be convicted on this impoverished proof, and lose all that is dear to him, than no man is safe. For all these reasons the judgment of conviction should be reversed and the indictment should be dismissed.

Respectfully submitted,

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The Daily Record

February 26, 1976

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(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
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T. Barry Kingham, Assistant U. S. Attorney
U.S. Courthouse
Foley Square
New York, New York 10007

Thomas J. Cahill, U.S. Attorney
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